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No. 89-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

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QUESTION PRESENTED

Whether the decision of the court below precluding retroactive ratemaking by natural gas pipeline companies regulated under the Natural Gas Act, should be reviewed, where the court followed the plain meaning of the statute and the precedents of both this Court and the circuit courts of appeal to reach a result that is consistent with the basic congressional objective to protect gas consumers.

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BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

The Respondent, Municipal Defense Group ("MDG"), is an ad hoc group of ten small municipal publicly-owned gas systems[1] who, during the time period at issue here, purchased the totality of their gas supply from one of the Petitioners, Panhandle Eastern Pipe Line Company, and distributed that gas to mostly residential customers within their service areas.

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[1] The Municipal Defense Group consists of the Cities of Clarence, Fulton, Hermann, Macon, Monroe City, Paris, Perry and Shebina, Missouri, and Edinburg and Stonington, Illinois.

COUNTERSTATEMENT

The Petitioners misstate the facts when they allege that the court below held that the Commission was "powerless to effect an admittedly equitable distribution of certain gas costs." Petition at 3. The Petitioners err in that the court did not hold that the Commission was "powerless." The court simply ruled that allegations of equity cannot empower an agency to ignore explicit legislative commands.[2] No party, in briefs or in oral argument before the D.C. Circuit, challenged, in any fashion, MDG's position that the Commission had the power to reopen and reconsider its Order 94 series and eliminate the retroactive payment from the pipelines to the producers. Attached Appendix at 6a, n.13.[3]

Secondly, the Commission's Order does not produce an "admittedly equitable distribution." MDG showed, without any challenge below, that the Commission's decision was not only inconsistent with law, but also

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[2] As is discussed in greater detail, *infra* at 8, n.7, this holding of the D.C. Circuit is virtually identical to the recent conclusion of this Court in *Maislin Industries U.S., Inc. v. Primary Steel, Inc., 58 U.S.L.W. 4862, (June 19, 1990), No. 89-624 (Maislin Industries).*

[3] Indeed, at page 16, the petition itself cites to this proposition:

> This reflects the long established rule that the Commission has ample power to "undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *accord: Office of Consumers' Counsel v. FERC*, 826 F.2d 1136 (D.C. Cir. 1987); *Tennessee Valley Municipal Gas Ass'n v. FPC*, 470 F.2d 446 (D.C. Cir. 1972).

in violation of the legitimate concerns of fairness and equity. Attached Appendix at 1a-6a.

The Petitioners' statement also alleges: "The costs in question are substantial, totalling approximately $1.5 billion for the industry as a whole. . ." Petition at 3. While MDG acknowledges that $1.5 billion has a "substantial" ring to it, it must be placed into the perspective of: (1) the $1.5 billion is approximately 1% of the operating revenues of the industry for the relevant time period; and (2) it was far less than the extra returns the Commission had allowed the pipeline industry to compensate that industry for bearing gas supply related risk. Attached Appendix at 2a-4a.

The Petitioners' statement regarding the statutory and regulatory background alleges that the Commission precluded interim Natural Gas Policy Act (NGPA), Sec. 110(a), 15 U.S.C. § 3320a (1982) costs from being collected by the producers:

> In 1980, FERC issued its Order No. 94, 45 Fed. Reg. 53,099 (1980), a rulemaking order that among other things imposed a moratorium on the collection by producers of the costs attributable to compression and gathering of gas. A moratorium was necessary, the Commission concluded, because the appropriate allowance for these activities presented a complex question and the Commission needed time to develop a factual basis upon which allowances could be authorized generically, . . .

Petition at 4-5. Petitioners also suggest that interim collection of Section 110 costs was mandated by the "explicit" provisions of the NGPA. However, the truth

of the matter is that the Section 110 costs allowed, as well as their interim collection, were "rights" created by the Commission, not Congress. When an earlier Commission addressed the issue of Section 110 costs, it stated: "The statute does not require the Commission to automatically permit the recovery of all such costs, but leaves to the discretion of the Commission whether to grant the authority to sellers to recover such costs." FERC Stats. & Regs. (CCH) ¶ 30,026 at 30,184 (1978). Moreover, nowhere in the NGPA is there the right of the producers to collect interim Section 110 costs prior to the final determination by the Commission.[4]

While it is true that the Fifth Circuit in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) (*"Texas Eastern"*) sustained the retroactive collection of interim Section 110 costs and required that the same retroactive treatment be given other Section 110 costs, the statutory language makes it clear that the Commission was not obligated to permit retroactive collection of any interim Section 110 costs.

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[4] Inasmuch as the NGPA does provide for interim collection of other costs prior to the final Commission determination, Sec. 503, 15 U.S.C. § 3413(e) (1982) pursuant to the doctrine of *expressio unius est exclusio alterius*, interim collection of Section 110 costs was, therefore, not intended. Only producers selling old gas dedicated to interstate commerce prior to November 8, 1978 had rights pursuant to Section 4 of the NGA to file for and to collect Section 110 prices, prior to Commission determination thereof. However, the earlier Commission recognized that it did not have to accept a filing for these Section 110 costs, inasmuch as it was under no obligation to permit any Section 110 costs for old gas. FERC Stats. and Regs. (CCH), ¶30,026 at 30,180 (1978).

Moreover, the preceding discussion should not obscure the fact that Section 110 of the NGPA is *not* involved in the instant proceeding.

The Natural Gas Act, 15 U.S.C. § 717, *et seq.* ("NGA or Act"), was enacted in 1938 "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Company v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959). While the overall objective was to protect consumers, the Act had some provisions which were clearly biased towards the utilities. Pursuant to Section 4(e), 15 U.S.C. § 717c(e) (1976) the utility had the right to place a rate into effect after a suspension period of no greater than five months. However, as drafted, and for all the relevant period involved herein, the Act had no similar provision governing rate decreases. To offset this, Congress wrote into the Act a specific bias favoring retroactive rate reductions, but not retroactive rate increases:

> It is not insignificant that the Commission acted consistently with the statutory bias favoring retroactive rate reductions but not retroactive rate increases, a bias Congress wrote directly into the statute:
>
> > "[T]he Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates

> are unjust, unduly discriminatory, preferential, otherwise unlawful, or not the lowest reasonable rates."

Belco Petroleum Corp. v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978).

It was fully contemplated that, pursuant to this bias, the pipelines might not be able to charge consumers rates that are otherwise fully just and reasonable. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962); *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985); *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166, 171 (D.C. Cir. 1985). Because of this, "the Commission has a duty to protect the consumer even if such results in some 'injustice' to [the pipelines]." *Hall v. FERC*, 691 F.2d 1184, 1193 (5th Cir. 1982).

The Petitioners also alleged that "the guaranteed passthrough" provision of the NGPA Section 601, 15 U.S.C. § 3431 (1989) requires the Commission to pass through all Section 110 costs regardless that the passthrough might violate the filed rate doctrine and the prohibition against retroactive ratemaking. Petitioners also allege that there are no allegations present in the instant case that the Section 110 costs are not subject to this guaranteed passthrough. Petition at 6.

However, this is a complete misrepresentation of the allegations which were before the court both in *Columbia Gas Transmission v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987) ("*Columbia I*") and *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"). The attached appendix, pages 10a-11a, are portions of the Municipal Defense Group's

Initial Brief to the Court in *Columbia I*. As can be seen therein, MDG established that the guaranteed passthrough provision does *not* apply to retroactive rates, or in any way grant the Commission the power to override the filed rate doctrine, or the prohibition against retroactive ratemaking. MDG essentially reiterated this showing in its brief in *Columbia II* with the addition of updated citations. Attached Appendix at 7a-8a. At no time during the briefing and oral argument in either *Columbia I* or *Columbia II* did any party offer any rebuttal to MDG's showing.[5]

In the Petition at page 9, note 5, the Petitioners state that the "lead Petitioner" before the court of appeals, Columbia Gas Transmission Corporation, had notice in fact of the Order 94 series. MDG submits, however, that Columbia Gas Transmission Corporation was the "lead petitioner" only because, alphabetically, "C" comes before "M." However, as MDG explained to the court of appeals:

> MDG is comprised of . . . small municipal systems and, as such, essentially represents the ultimate residential consumer whose protection is the primary purpose of the Natural Gas Act. Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378, 388 (1959). Thus in terms of the interests represented, MDG submits that it is the *most* significant party hereto.

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[5] The Petitioners' failure to even attempt to rebut MDG's arguments established the issue as substantively unrebutted before the lower court and may not be substantively challenged for the first time here. Moragne v. State Marine Lines, 398 U.S. 375, 378 n.1 (1970); Giordenello v. United States, 357 U.S. 480, 488 (1958); California v. Taylor, 353 U.S. 553, 556 n.2 (1957).

MDG Reply Brief at p. 10, n.6. And, in contrast to the alleged "lead petitioner," MDG had no notice of the Order 94 series, either *de facto* or *de jure*.[6]

As a last correction to Petitioners' statement of the case, MDG notes that Petitioners allege that the court below concluded that there was "no flexibility . . . for the Commission 'to mitigate the damages its errors of judgment or rulemaking delays might have caused.' " Petition at 10. However, as indicated earlier, *supra* at 2, this is a misstatement of the court's ruling. The court concluded simply that allegations of equities are insufficient to permit the Commission to "ignore explicit legislative commands" in order to mitigate such alleged damages.[7]

However, as MDG maintained before the court below with *no* challenge from any other party, and continues to maintain here, one available response of the Commission in the circumstances of the court's opinion would be to reopen the Order 94 series and eliminate the retroactive payment to producers. Such action on the part of the Commission would indeed "mitigate the damages its errors of judgment or rulemaking delays might have caused." Attached Appendix at 6a n.13.

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[6] This is discussed in greater detail, *infra* at 23-25.

[7] There is certainly nothing challengable about the court's conclusion. The conclusion is virtually identical to that made by this Court in *Maislin Industries*, 58 U.S.L.W. at 4864-4865.

RESPONSE TO ALLEGED REASONS FOR GRANTING THE WRIT

A. The Decision Below Is Fully Consistent With The Plain Meaning Of The Statute And The Time-Honored Precedents Of The Other Circuit Courts Of Appeal, As Well As The Supreme Court

Petitioners commenced their statement of Reasons For Granting the Writ by attempting to distinguish this Court's very recent decision in *Maislin Industries, supra.* While it is true that the scope of the filed rate doctrine applicable to the Interstate Commerce Commission ("ICC") is not identical to the filed rate doctrine applicable to the FERC, in most respects, *Maislin Industries* is dispositive of the issues advanced in the Petition.

At 12-16, the Petitioners commence with a citation to *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968): "The Commission 'must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests,' " and close with a citation to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984): "that courts should defer to a regulatory agency's interpretation of the organic statutes it administers."

As thus presented, the issue is virtually identical to that before the Court in *Maislin Industries*. There, the ICC argued that its

> conclusion is entitled to deference because [the statute] does not specifically address the types of practices that are to be considered unreasonable and because its construction is

> rational and consistent with the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defenses Council, Inc.*, 467 U.S. 837, 843 (1984).

58 U.S.L.W. at 4865. However, the Court rejected the ICC's argument because it was inconsistent with the language of the statute and the historical interpretation of the filed rate doctrine by the Court. This, too, is the situation in the instant case.

Similarly, just as the Court in *Permian Basin* recognized that the Commission's latitude was constrained by "pertinent constitutional and statutory commands," this Court, as well as the courts of appeal has always recognized that the filed rate doctrine and the rule against retroactive ratemaking prohibit what the Commission attempted to do in these proceedings.

To begin with, in its decisions below, the Commission attempted to read the Natural Gas Act in a manner which violates rules of statutory construction.[8] The Commission attempted to read Section 4, 15 U.S.C. § 717c (1976), of the Act in a manner which would make it totally inconsistent with Section 5, 15 U.S.C. § 717d (1976), of the Act. The court below, however, read the two sections in a manner so that they were consistent with one another.

At 13, Petitioners quote the language from Section 4(d) of the NGA:

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[8] The courts should strive to read different sections of the same statute as consistent with one another. *See* Lewis v. Hegstrom, 767 F.2d 1371 (9th Cir. 1985); Green v. Commissioner of Internal Revenue, 707 F.2d 404 (9th Cir. 1983); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).

> *Unless the Commission otherwise orders*, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and the public . . . . *The Commmission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for* by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (emphasis in Petition). However, Petitioners do not quote the text of Section 5 of the NGA. Under that latter section, the Commission is empowered, after a hearing, to determine a just and reasonable rate. . .

> to be *thereafter* observed and in force, and shall fix the same by order: *provided, however*, that the Commission shall have *no power* to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; . . . .

15 U.S.C. § 717d (emphasis in original and added).

From the very enactment of the NGA, this Court has recognized that Section 5 prohibits the Commission from retroactively changing rates or ordering reparations. *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 618 (1944); *Montana-Dakota Utilities Com-*

pany v. Northwestern Public Service Company, 341 U.S. 246, 251 (1951) ("*Montana-Dakota*").

More recently, in *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 578 (1981) ("*Arkansas Louisiana*"), this Court underscored the fact that Section 5 deprived the Commission of *any* power to engage in retroactive ratemaking:

> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has *no power* to alter a rate retroactively. When the Commission finds a rate unreasonable, it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." § 5(a), 52 Stat. 823, 15 U.S.C. §717d(a) [15 USCS § 717d(a)] (emphasis added).

(Footnote omitted). All the D.C. Circuit did in the proceedings below was apply this Court's decision in *Arkansas Louisiana* to the facts of the instant proceeding:

> [T]he effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA.
>
> * * *
>
> In its discussion of the doctrine in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-

78, 101 S.Ct. 2925, 2929-30, 69 L.Ed.2d 856 (1981), the Supreme Court notes that

> The [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.

Id. at 578, 101 S.Ct. at 2931. Moreover, the Court explicitly states, in a footnote, that "the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations. . . ." *Id.* at n.8.

Columbia I, 821 F.2d at 1140.

Moreover, this application of the Court's decision in *Arkansas Louisiana* was not unique to the instant proceeding, or even to the D.C. Circuit. The same conclusion, *i.e.*, that Section 5, and its analog under the Federal Power Act, Section 206, 16 U.S.C. § 824(e) (1985), absolutely prohibit the Commission from retroactively modifying rates, was contained in D.C. Circuit Opinions in *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) and *Public Service Company of New Mexico v. FERC*, 857 F.2d 833 (D.C. Cir. 1988), as well as the Tenth Circuit's decision in *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

The plain meaning of Section 4 is that the waiver provision applies only to the requirement of 30 days' advance notice and nothing more. The language itself is totally prospective and is not susceptible to being viewed as sanctioning the retroactive modification of

rates for gas sold many years in the past. The court below interpreted Section 4 in a manner to make it consistent with Section 5, *i.e.*, that the Commission may waive notice of a new rate filing where good cause is shown, but never in a situation which would involve the retroactive increase in rates which is prohibited by Section 5.

The Commission and the Petitioners, on the other hand, are attempting to read Section 4 in a manner inconsistent with and in total contradiction of Section 5. Notwithstanding that Section 5 emphatically states that the Commission shall have "no power" to retroactively increase rates, the Commission concluded that the provision in Section 4, addressed solely to a 30-day notice provision, grants it *total* power to retroactively increase rates in *any* circumstance where it might conclude there to be "good cause." This bizarre attempt at statutory construction could not be defended at all by the Commission in oral argument before the court below. Attached Appendix at 11a-13a.

Such reading is not only inconsistent with the plain meaning of the statute and the rules of statutory construction, but if accepted herein would functionally overturn precedents the Commission has not challenged and now recognizes as binding.

In *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) ("*Electrical District*"), the D.C. Circuit, in citing to both this Court's decision in *Arkansas Louisiana* and the language of Section 206 of the Federal Power Act, 16 U.S.C. § 824e (the analog of Section 5 of the NGA), concluded that even when the Commission determined in a hearing, that the existing rates of a utility were unjust and unreasonable, the

Commission could not order the customers to pay higher "just and reasonable" rates until *after* the Commission had actually accepted new just and reasonable rates filed by the utility.

Section 205 of the Federal Power Act has the same waiver of the 30-day notice requirement upon a finding of good cause as has Section 4 of the NGA. Pursuant to the Commission's and the Petitioners' position here, the Commission had the power to turn the *Electrical District* decision into a vacuous exercise by simply finding, on remand, that inasmuch as it had found the utility's rates to be fully just and reasonable, there was clearly "good cause" for waiving the notice provision and permitting those "just and reasonable" rates to become effective prior to the filing of the new rate schedules by the utility.

We don't believe that Justice (then appeals court Judge) Scalia felt he was engaging in a vacuous exercise when he wrote the Opinion in *Electrical District*. And neither did the Tenth Circuit when, in *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201, 1225 (10th Cir. 1987), it stated that it was persuaded by the reasoning of *Electrical District* and concluded that there could be no *ad hoc* facts (whether constituting good cause or otherwise) which could permit the Commission to engage in retroactive ratemaking.[9]

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[9] Not only did the Commission not seek review of the *Electrical District* or *Public Service Company of New Mexico* decisions, but it currently follows those decisions as binding precedents on the construction of its enabling legislation. Kansas Gas & Electric Company, 34 F.E.R.C. (CCH) ¶ 61,288 at 61,517 (1986).

There are a number of statements and citations advanced by Petitioners at pages 12 through 16 to which response is appropriate. At page 14, Petitioners suggest that the Fifth Circuit's decision in *Texas Eastern* recognized that the Commission could waive the NGA's prohibition against retroactive ratemaking. This is incorrect. The *Texas Eastern* decision did not deal with the waiver provisions of Section 4 of the NGA because the decision was based not on the NGA, but Section 110 of the NGPA. The NGPA does not provide for filed rates as does the NGA, nor does it contain any express prohibition against retroactive ratemaking.

Also at page 14, the Petitioners allege that the court below's "crabbed view of the Commission's waiver powers is wholly at odds with the language of Section 4(d) which requires 'good cause,' not agreement by the parties or advance notice by the Commission." However, Petitioners' argument had already been answered by MDG in its brief to the lower court:

> At 30, the Pipelines argue that waiver is permitted upon a showing of "good cause" and that good cause is not synonymous with "customer consent." The Commission similarly argues that the NGA permits waiver for "good cause" and nowhere limits good cause to simply effecting the "contractual intent" of the parties. Commission Br. at 31. However, none of the Petitioners here have ever alleged that good cause is limited only to customer consent or contractual intent, but rather only that, consistent with the case law cited previously, a good cause waiver comes into play only where true retroactivity is *not*

> involved. Thus, the Commission can permit a rate increase to become effective on a 20-day notice, a 10-day notice, or even a zero-day notice, upon a finding of any kind of "good cause." However, if the Commission attempts to make a rate increase effective prior to the date of filing, then it must show, as noted above, either (1) it is not imposing a retroactive rate alteration but simply giving effect to the contractual intent of the parties as to the effective date of a rate or (2) the waiver does not violate the consumer protection purposes of the filed rate doctrine and rule against retroactive ratemaking.

Reply Brief of Petitioner, Municipal Defense Group at 9, n.5. The alleged "crabbed view" is the only interpretation of Section 4(d) which does not cause it to come into irreconcilable conflict with Section 5, and MDG submits, the only interpretation which is consistent with the plain meaning of Section 4 itself.

At 14, n.7, the Petitioners cite both *Hall v. FERC*, 691 F.2d 1184, 1191-1192 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) and *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979) as supportive of their argument. However, to the contrary, both of these cases concluded that the Commission could not grant waiver of Section 4 so as to permit a retroactive rate increase in violation of Section 5. Both cases state that a waiver of Section 4 (or the Federal Power Act analog, Section 205) is permissible only where there was no retroactive rate increase involved.

At 15, Petitioners attempt to contrast the situation here with the Court's recent *Maislin Industries* decision, stating:

> Here, in contrast, the issue is whether the Commission has the authority to approve a surcharge to recover deferred costs, the recovery of which is expressly authorized by statute. As noted above, these rates were all on file, and the collections were at the filed rate levels.

However, Petitioners are wrong. Nowhere does the NGA authorize, "expressly" or otherwise, a surcharge to recover past costs. These rates were not "on file", nor were the collections "at the filed rate levels" at the time the gas was being sold and consumed by consumers. And, to cite once again this Court's decision in *Arkansas Louisiana*, "the [Natural Gas] Act . . . prevents the Commission itself from imposing a rate increase for gas already sold." 453 U.S. at 578.

Also at 15, Petitioners argue: "The error of the D.C. Circuit's approach is highlighted by its concession . . . that the Commission's assessment of the equities and the public interest in this instance appeared to be sound." As discussed *supra* at 2, MDG does not read the decision below as constituting any acknowledgment of the soundness of the Commission's assessment of the equities. MDG reads the court's statement that "the Commission may well be correct in its assessment of the equities" as the court's agreement with the position of MDG that one equitable disposition of this case could be for the Commission to reopen the Order 94 series to restore the *status quo ante*. But regardless whose interpretation is correct, the legal significance of the lower court's statement is identical to that of this Court in *Maislin Industries*:

> [T]his Court has read the statute to create strict filed rate requirements and to forbid equitable defenses . . . .
>
> * * *
>
> Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it.

58 U.S.L.W. at 4864, 4865.

At 16, Petitioners allege that the D.C. Circuit's later opinion in *Transwestern Pipeline Company v. FERC*, 897 F.2d 570, 578 n.5 (D.C. Cir. 1990) acknowledge that the Commission's waiver power under Section 4(d) could come into play in situations not contemplated by the court below in the instant case. However, this is a miscitation. In note 5, the *Transwestern* court did not discuss the Commission's "waiver" power under Section 4(d). The court's reference was simply to the inherent historical equity powers of courts of original jurisdiction to undo what is wrongfully done by virtue of their orders. Such power does not rest on any waiver authority, but rather on the common law.[10] Indeed, the note 5 of

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[10] In the Federal system, this common law power has been carried over into the provisions of Fed. R. Civ. P. 60(b), 28 U.S.C. 60(b) (1990). Accordingly, it has been recognized that, notwithstanding the one-year limitation in Rule 60(b) regarding the power of the courts to reform judgments, the federal courts have the same historical authority of equity courts in general to undo their own wrongs for an indefinite period of time, subject only to the defense of latches. Goland v. CIA, 607 F.2d 339, 373 (D. C. Cir. 1978); Carr v. District of Columbia, 543 F.2d 917, 926-927 (D.C. Cir. 1976); West Virginia Oil and Gas Company, Inc. v. George E. Breece Lumber Company, 213 F.2d

the *Transwestern* decision, cited by Petitioners, explicitly concluded that this inherent equity power is totally unrelated to the Section 4(d) waiver power that was at issue before the court.

B. That The Case Below Does Not Represent An Important Question For This Court To Consider Is Underscored By The Fact That The Statutory Interpretation Of The Lower Court Is Not Unique, But Consistent With A Long Series Of Cases Preceding And Succeeding The Decision Below In Both Gas And Electric Cases Involving Both The D.C. And Other Circuits

Petitioners' Argument number 2, which commences at page 17, cites to a number of D.C. Circuit decisions issued both prior and subsequent to the decision below, which interpreted the Natural Gas Act in the same manner as the instant decision, as suggesting that this case presents an important federal question for the Court's review. However, MDG submits that consistency is a virtue, not a vice.

Petitioners' argument at 19 that the decision below "eventually will be carried over by the court to the electric power industry as well" is puzzling. The original conclusion that the Commission's attempt to retroactively bill consumers for Section 110 costs was barred by the filed rate doctrine and rule against retroactive ratemaking in *Columbia I*, was predicated on two primary precedents: (1) *Arkansas Louisiana* and (2) *Electrical District*. 831 F.2d at 1140-1141. The latter case, of course, involved the electric power

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702, 704-706 (5th Cir. 1954).

Although this common law power could be employed by the Commission to undo the wrongs done in the Order 94 Series, it could not be employed to overcome Section 5's specific prohibition against retroactive rate increases.

industry; and, inasmuch as it preceded the decision below, it would be more realistic to allege that this particular interpretation of the filed rate doctrine and prohibition against retroactive ratemaking was "carried over" from the electric power industry to the natural gas industry.

However, that would equally misstate the issue because neither the decision below nor *Electrical District* created either the filed rate doctrine or the prohibition against retroactive ratemaking. The Congress did in enacting both Section 5 of the Natural Gas Act and Section 206 of the Federal Power Act. All the court below did is follow the plain meaning of those statutes as enacted by Congress and as consistently interpreted by this Court in *Hope Natural Gas, Montana-Dakota* and *Arkansas Louisiana*, the D.C. Circuit in *Electric District* and the Tenth Circuit in *Public Service Company of New Mexico*.

There is no inconsistency in the interpretation of these statutory provisions in any of these cases. The inconsistency that does exist is the inconsistency between the interpretation of the Petitioners and the decisions of the courts, as well as the plain language of Congress. The Petitioners' position not only cannot be reconciled with the decision of the court below, it cannot be reconciled with the decision in *Electrical District*, the decision in *Public Service Company of New Mexico*, the decision in *Arkansas Louisiana*, etc.

C. There Is No Conflict Between The Decision Below And That Of Any Other Circuit

In its argument Section 3, commencing at page 19, Petitioners allege that there is a conflict between the decision below and the decisions of the Fifth Circuit

in *Texas Eastern* and the Tenth Circuit in *Phillips Petroleum Co. v. FERC*, 902 F.2d 795 (10th Cir. 1990). However, it is clear from the face of these decisions that they are not conflicting because, *inter alia*, they aren't even interpreting the same statutes. The *Texas Eastern* and *Phillips Petroleum* decisions were addressed to Section 110 of the NGPA, while the decision below was addressed to Sections 4 and 5 of the NGA. The fact that there is no conflict is obvious when one compares the Tenth Circuit's *Phillips Petroleum* decision with the Tenth Circuit's decision in *Public Service Company of New Mexico*. The Tenth Circuit's *Public Service Company of New Mexico* decision was addressed to Section 206 of the Federal Power Act, the parallel provision of Section 5 of the Natural Gas Act.

As discussed *supra* at 15, in *Public Service Company of New Mexico*, the Tenth Circuit, following the precedent of *Electrical District* (which followed the precedent of *Arkansas Louisiana*) concluded that the Act completely prohibited any attempt to retroactively increase rates and that there were no *ad* hoc facts (good cause) which could overcome that prohibition. Thus, the Tenth Circuit's *Public Service Company of New Mexico* decision is substantively identical in legal import to the decision of the court below in the instant proceeding.

Yet, the Tenth Circuit found no conflict between its decision in *Public Service Company of New Mexico* and its decision in *Phillips Petroleum*. Thus, there is no conflict at law between the decisions, as alleged by Petitioners. The alleged "conflict" is essentially the same type of argument alleging an "inequitable" result from the interrelation of two different statutes

administered by the same agency, as was so recently rejected by this Court in *Maislin Industries*. However, such arguments cannot be transformed into a legal conflict between the Circuits, or justification for the court ignoring the plain meaning of the statute to avoid the alleged inequitable result.[11] This is essentially the finding of the court below, as it was the finding of this Court in *Maislin Industries*. And, as the Court said in *Maislin Industries*, the alleged inequitable result which stems from the two different, allegedly conflicting statutory schemes, is properly addressed to Congress, not the courts. 58 U.S.L.W. at 4867.

Even though the *Texas Eastern* decision interpreted a different statutory scheme, with neither a filed rate doctrine nor a prohibition against retroactive ratemaking, it recognized the lawfulness of the Commission's retroactive effective date for the Section 110 allowances was predicated on the purchasers having received adequate notice.[12]

At 20, Petitioners argue that adequate notice to pipeline purchasers of producer gas pursuant to the

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[11] The allegation notwithstanding, MDG's showing that there was no inequitable result was unchallenged below. Attached Appendix at 1a-6a.

[12] Petitioners suggest that the Fifth Circuit in Texas Eastern found that the NGPA mandated retroactive application of the Section 110 costs. However, as discussed *supra* at 4, that inference is absolutely false. The Fifth Circuit concluded that, in view of the adequacy of the notice given, retroactive application was not unlawful, but the court did reverse the Commission's attempt to discriminate between different classes of Section 110 charges and required equal retroactivity for some Section 110 charges for which the Commission had previously denied retroactivity. 769 F.2d at 1065-1066.

NGPA is tantamount to adequate notice to pipeline customers under the NGA. However, as the court below in *Columbia I* found, this inference is untenable. 831 F.2d at 1141.

Pursuant to Commission rules, pipeline customers such as members of the MDG must receive specific notification by mail of any proposal to change the filed rate tariffs under which those customers take service and pursuant to which those customers pay for the service taken. 18 C.F.R. § 154.16(b) (1988).

However, in contrast, as the Court in *Columbia I* found, the notice the Commission gave in the Order 94 series was so tentative, conditioned, and restrictive, that customers like the MDG really could have no idea what potential impact such orders might have:

> Although FERC claims that "Order Nos. 94 and 94-A gave notice that the prices paid for gas during the pendency of the Commission's rulemaking were not final prices," Brief for Commission at 16, the orders were explicitly concerned with *first sales*. Furthermore, even in that context, the Commission was careful to limit the application of Order No. 94-A to those cases in which first purchasers were contractually bound to pay the deferred costs.
>
> "As a general matter, the final rules will not operate to authorize the collection of amounts for production-related costs incurred prior to today. A basic principle of administrative procedure is that rules should operate prospectively only. We see no reason to depart from this principle in implementing these amendments. To the

> contrary, there is good reason to adhere to it."

48 Fed. Reg. at 5,161. In a footnote to the above-quoted section, the Commission stated:

> "An exception is made in the case of delivery or compression services. However, this exception is based upon the Commission's notice in Order No. 94 that these costs could be recovered. In addition, this recovery is under particular safeguards to insure that amounts collected for these services may only be collected *if contractual authority existed to collect them at the time they were incurred.*"

Id. at n.89 (emphasis added); *see* 18 C.F.R. § 271.1104(c)(4)(ii). It is thus clear that the notice provided by the two orders was limited to a highly restricted audience.

Columbia I, 831 F.2d at 1141. It is also clear that the notice given in the Order 94 series not only failed to comply with the required notice under the Commission's rules, the notice was many times more obscure and less adequate than the notice found unlawfully inadequate in *Electrical District*.[13]

At 20-21, note 10, Petitioners argue:

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[13] At 22, Petitioners cite Judge Wald's dissent from the denial of rehearing *en banc* in Associated Gas Distributors v. FERC 898 F.2d 809, 811 (D.C. Cir. 1990). While there are some similarities between the instant proceeding and *Associated Gas Distributors*, what is particularly telling about Judge Wald's dissent is the fact that she did not dissent in the instant proceeding. See Petitioner's Appendix at 15a.

> Thus, the D.C. Circuit's finding that pipeline customers had inadequate notice that they would one day be charged for production-related costs is implausible. As the Fifth Circuit remarked under similar circumstances, the courts should 'greet[ ] such assertions, made by highly sophisticated industry participants, with skepticism.' *Shell Offshore, Inc. v. FERC*, 858 F.2d 1147, 1153 (5th Cir. 1988).

MDG submits, in the circumstances of this case, there is no comparison whatsoever between the "highly sophisticated industry participants" such as Shell Offshore, etc. and respondents in this case, such as MDG.

MDG members are small municipalities whose utility departments make up just one small (and usually very small) part of a small municipal government. They rely, and rightfully so, on the Commission's rules which provide that they will be specifically notified in the event of a proposed change which would effect their gas tariffs. Moreover, they have a right to rely on that notice, not only because of the Commission's rules, but because of the very purpose of the Natural Gas Act and Federal Power Act:

> [The Act's] primary purpose [is] protecting the utility's customers. *See Town of Alexandria, Minnesota v. FPC*, 555 F.2d 1020, 1028 & n.42 (D.C. Cir. 1977). The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, *cf, Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 344 (D.C. Cir.

> 1974), *cert. denied*, 420 U.S. 946, 95 S. Ct. 1326, 43 L.Ed.2d 424 (1975), but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L.Ed.2d. 856 (1981).

Electrical District, 774 F.2d 490 at 493.

The Petitioners in *Shell Offshore, Inc.* were producers. The sale of gas was their business. It was not ancillary to any other function of their organization or reason for being. The Commission rule at issue in *Shell Offshore, Inc.*, the change from the "wet rule" to the "dry rule", had an immediate and substantial direct impact on their very profitability, the reason for which businesses exist. By every standard and most particularly the purposes of the Natural Gas Act, the comparison is ludicrous.[14]

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[14] At 21, note 11, Petitioners cite to Nantahala Power Company & Light Company v. Thornburg, 476 U.S. 953 (1986) as prohibiting the potential of "trapped costs" as the result of the opinions between *Columbia II* and *Texas Eastern*. However, that citation is wholly inapposite. The illegality in *Nantahala* was the fact that the potential trapping of costs would produce a violation of federal pre-emption. In this case, no such possibility exists. No party challenged MDG's conclusion that the Commission has inherent authority to "untrap" the costs if it chooses. Moreover, unlike the situation in *Nantahala*, the record in this case shows that the Commission's ratemaking policies fully compensated the pipelines in advance for the potential "trapped" costs.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Respondent, Municipal Defense Group, respectfully requests that this Court deny certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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July 25, 1990

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APPENDIX

Reply Brief of Petitioner,
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* * *

5 U.S.C. § 557(c)(3)(A) requires that the Commission issue a reasoned decision on all material issues of fact, law or discretion presented to it. Not only did the Commission patently fail to do that below, it continues to fail to address the material issues advanced by MDG or to provide reasoned responses thereto.

IV. CONCERNS OF FAIRNESS AND EQUITY ARE FULLY CONSISTENT WITH THE PROHIBITION AGAINST RETROACTIVELY CHARGING THE CONSUMERS IN THIS MATTER

As the preceding has established, what the Commission has attempted in this proceeding is clearly an unlawful retroactive rate increase. The Commission argues, however, that concerns of fairness here are "overarching." Commission Br. at 24. While it is questionable whether concerns of fairness can ever "overarch" the law, as will be shown hereinafter, in this case, concerns of fairness are completely consistent with the law.

The Natural Gas Act, 15 U.S.C. § 717 *et seq.*, was enacted "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Company, supra.*[8] However,

[8] While the overall objective was to protect consumers, the Act has some provisions which are clearly biased towards the utilities. Pursuant to Section 4(e) the utility has the right to place a rate increase in effect after a suspension period of no greater than five months. However, there is no similar provision governing rate decreases. To offset this, Congress wrote into the Act the bias favoring retroactive rate reductions, but not retroactive rate increases. Belco Petroleum Corporation v. FERC, *supra.* It was fully contemplated that because of

commencing in about 1970, the Commission and, to a degree, Congress, became primarily concerned with the apparent shortage of gas and much of the consumer protection objectives of the Natural Gas Act were ignored. Wellhead prices for new natural gas rose from 19¢ per Mcf to $3.75 per Mcf. Order No. 451, III FERC Stats. and Regs., Regs. Preambles ¶ 30,701 at 30,204, 30,206 (1986). Even "old" gas, the investment in which was predicated on prices in the 20¢ per Mcf range, rose to over $1.40 per Mcf. *Id.*

Not only did the pipelines pass through all these costs, they were also made the specific beneficiaries of incentives to promote increased supplies of natural gas. Pursuant to the latitude given it in the Revenue Act of 1971, the Commission permitted pipeline companies to keep all of the benefits of investment tax credits. The Commission gave the pipelines the "short supply" benefits of the Act, which were arguably only intended to be applicable to producers inasmuch as they were designed to provide incentives for increased production of natural gas. Nonetheless, the Commission, in its no-holds barred attempts at increasing natural gas supplies, permitted natural gas pipelines to keep *all* the benefits of the investment tax credits from 1971 to 1986. *Ratemaking Treatment of Investment Tax Credit For Natural Gas Pipeline Companies*, Order 440, 33 F.E.R.C. ¶ 61,295 (1985). This constituted a specific allowance for the pipelines to recover *more* than their prudently-incurred costs.

The Commission also considerably loosened its regulation of the pipelines across the board. Whereas, pursuant

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this bias, the pipelines might not be able to charge consumers rates that are otherwise fully just and reasonable. FPC v. Tennessee Gas Transmission Company, 371 U.S. 145, 152-153 (1962). *Electrical District, supra*; Interstate Natural Gas Assoc. of America v. FERC, 756 F.2d 166, 171 (D.C. Cir. 1985). Because of this, as *Hall* stated at 1193, "the Commission has a duty to protect the consumer even if such results in some "injustice" to [the pipelines]."

to *Atlantic Refining Company, supra*, the Commission was supposed to set rates of return at "the *lowest* possible reasonable" level, nonetheless the Commission started allowing returns at the *upper* end of the zone of reasonableness. *Tennessee Gas Pipeline Company*, Opinion No. 769, 56 F.P.C. 120, 139 (1976); *Natural Gas Pipeline Company of America*, Opinion No. 762, 55 F.P.C. 2328, 2340 (1976); *Algonquin Gas Transmission Company*, Docket No. RP73-112, 2 F.E.R.C. ¶ 63,004 at 65,029 (1976); *Tennessee Valley Municipal Gas Association v. Alabama-Tennessee Natural Gas Company*, Opinion No. 594, 45 F.P.C. 635, 642 (1971), *rev'd on other grounds*, 470 F.2d 446 (D.C. Cir. 1972).

The result of all of these policies was earned returns for the gas pipeline industry that were truly unprecedented. Even though the Commission now recognizes that gas pipeline companies are less risky than unregulated firms generally and no more risky than the electrics,[9] their earned return for the decade of the 70's exceeded those of the electrics by 475 basis points and the Standard & Poors 400, the cream of the unregulated sector of American industry, by almost 300 basis points:

Year	S & P 400	Gas Transmission	Electrics
1970	11.87%	15.75%	12.70%
1971	11.57	15.67	12.36
1972	12.23	15.54	12.67
1973	13.86	15.51	11.95
1974	14.78	14.89	10.71
1975	13.21	17.57	11.63
1976	14.35	17.28	12.03
1977	13.68	17.94	11.75

[9] Tennessee Gas Pipeline Co., Opinion No. 190, 25 F.E.R.C. ¶ 61,020 at 61-095-61-097 (1983).

1978	14.58	17.30	11.93
1979	17.04	19.37	11.63

Algonquin Gas Transmission Company, Docket No. RP80-72, Initial Decision, 17 F.E.R.C. ¶ 63,063, 65,314 (1981). When totaled up, the excess profits allowed by the Commission for the period 1970 through 1983 alone equaled over 60% of the total net worth of the entire pipeline industry.[10]

The $1.5 billion retroactive charges at issue in this case may seem like a huge sum. However, as compared to either the additional profits allowed the producers, or the excess profits granted the pipelines, it is a drop in the bucket. Clearly, most of the "complete, permanent and effective bond of protection from excess rates and charges" of *Atlantic Refining Company* has been rendered a nullity. About all that is left are the protections of the filed rate doctrine and prohibition against retroactive rate increases.

The Commission's objective in every case, pursuant to the NGA, should be the "lowest possible reasonable cost consistent with the maintenance of adequate service." *Atlantic Refining Company*, 360 U.S. at 388. The producer price rise cited *supra* was not simply mandated by the NGPA. Wherever the Commission had the discretion to

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[10] The Commission did not permit an evidentiary hearing on remand below and, accordingly, both the Commission and the pipelines have attached considerable extra-record evidence to their briefs. The 60% plus figure can be obtained by simply summing the difference between the return earned by the gas transmission industry and that earned by the electric utility industry for the relevant years from the *Algonquin Gas Transmission Company* decision cited above, and "Statistics of Interstate Natural Gas Pipeline Companies", and "Financial Statistics of Selected Electric Utilities," Energy Information Administration. However for easy access to these calculations, we would refer the Court to the Joint Appendix, Volume 4, J.A. 718-721, currently before the Court in American Gas Association, *et al* v. Federal Energy Regulatory Commission, No. 87-1588, *et al.* The parties before the Court in this case are also parties in No. 87-1588, *et al.*

increase prices above NGPA levels, it did so and, in the case of high-priced gas, doubled that level. Order No. 99, FERC Stats. and Regs., ¶ 30,183 (1980).[11] Similarly, there was nothing in the Commission's enabling legislation which could countenance the excess profits it permitted the pipelines to earn.

The net results of these policies were gas prices that were simply too high for the market to bear. Unregulated market prices currently range between $1.05 and $1.65 per Mcf. *See* Addendum. The difference between the current market price of gas and the unnecessarily high prices set by the Commission has primarily produced the take-or-pay crises which is being litigated before this Court in Docket No. 87-1588.

At 29 of its brief, the Commission alleges that its current policy is to "give consumers the benefit of a competitive wellhead market." Yet, the impact of the orders on appeal is to retroactively increase prices to producers to a level above the previously excessive high levels that themselves were far above the current competitive wellhead market.

Even the Commission's allegations of fairness arise entirely from its own strawman argument. At 24, the Commission alleges that inasmuch as it thought the notice it gave in Order 94 was legally sufficient, it therefore "precluded" the pipelines from collecting Section 110 costs prior to its determination of those costs. Similarly, the Pipelines argue that these costs are not retroactive because the producers would have recovered the costs currently, had it not been for the FERC's recovery "moratorium." Joint Br. at 33. In a similar vein, the Commission states that the Section 110 costs at issue here were "authorized" by Congress. Commission Br. at 4.

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[11] In Order No. 451, *supra*, the Commission has continued to increase producer prices, this time by eliminating vintaging from old gas contracts.

However, the truth of the matter is that the costs allowed, as well as their retroactive collection, were "rights" created by the Commission, not Congress. When an earlier Commission addressed the issue of Section 110 costs, it stated: "[t]he statute does not require the Commission to automatically permit the recovery of all such costs, but leaves to the discretion of the Commission whether to grant the authority to Sellers to recover such costs." FERC Stats. and Regs., ¶ 30,026 at 30,184 (1978).

Moreover, nowhere in the NGPA is there the right of the producers to collect interim Section 110 costs prior to the final determination by the Commission.[12] Accordingly, there are no equities flowing from the Commission's "moratorium." If, instead of just expressing the concerns about fairness, it had acted on those concerns, the $1.5 billion of retroactive charges at issue here would never have existed.[13]

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[12] Inasmuch as the NGPA does provide for interim collection of other costs prior to the final Commission determination, 15 U.S.C. § 3413(e), pursuant to the doctrine of *expressio unius est exclusio alterius*, interim collection of Section 110 costs was, therefore, not intended. Only producers selling old gas dedicated to interstate commerce prior to November 8, 1978 had rights pursuant to Section 4 of the NGA to file for and to collect Section 110 prices, prior to Commission determination thereof. However, the earlier Commission recognized that it did not have to accept a filing for these Section 110 costs, inasmuch as it was under no obligation to permit any Section 110 costs for old costs. FERC Stat. and Regs., ¶ 30,026 at 30,180 (1978).

[13] The Commission now realizes that it was operating under a mistake of law in Orders 94 and 94-A. Commission Br. at 24. No party has challenged MDG's position that, in these circumstances, the Commission could reconsider those orders and deny the producers the right to retroactively bill the Pipelines. *See* citations in MDG Initial Br. at 16 n.11. *See also*, FPC v. Sunray DX Oil Company, 391 U.S. 9, 43 (1968); Tennessee Valley Municipal Gas Association v. FPC, 470 F.2d 446, 452-453 (D.C. Cir. 1972).

V. WHILE SECTION 601 OF THE NGPA LIMITS THE COMMISSION'S DISCRETION, IT GRANTS THE COMMISSION NO POWER TO PERMIT RETROACTIVE RATE INCREASES

The Pipelines and the Commission allege that flow-through of these retroactive charges is required by the "guaranteed passthrough" provision of the NGPA, § 601, 15 U.S.C. § 3431. Section 601 deems NGPA prices to be "just and reasonable" for the purposes of Sections 4 and 5 of the NGA, and restricts the Commission's power and discretion to "deny" Pipelines recovery of the NGPA "just and reasonable" amounts paid. However, as noted *supra*, in *Arkansas Louisiana* the Supreme Court found that, pursuant to the NGA, neither the Commission nor the courts had *any* power to grant or "deny" retroactive rate increases.

While the NGPA restricted some of the Commission's discretion under the NGA, there is nothing in the NGPA which expands the Commission's NGA powers to permit it to violate the filed rate doctrine or the ban against retroactive ratemaking. The fact that Section 601 of the NGPA deems these rates to be "just and reasonable" for the purposes of Sections 4 and 5 of the NGA does not permit a retroactive increase. As already noted, the filed rate doctrine and rule against retroactive ratemaking bar "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.[14]

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[14] Even in Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053, 1068-1069 (5th Cir. 1985), it was recognized that the NGPA did not modify the pre-existing ratemaking principles to guarantee the pipelines the right to recover from consumers all gas costs subject to NGPA pricing. The court ruled that, consistent with the Commission's past consumer protection principles, the pipelines could only passthrough to consumers the NGPA maximum lawful price, not the cost of transporting the producers' own liquids. If the contract between the pipeline and producer provided that the pipeline would provide that service to the producer, the pipeline, *not* the consumer, would have to bear the

At page 22 of the Commission's brief, they argue that all consumers were put on notice that Section 601 of the NGPA would guarantee the pass through of these retroactive costs because of the following language contained in Order No. 94:

> [t]his Rule . . . establishes a policy . . . [that] provides that certain types of production-related costs incurred by an interstate pipeline purchaser *will be deemed prudently incurred in proceedings brought under the Natural Gas Act.*

Commission Br. at 22.

The Commission is wrong. Pursuant to the Natural Gas Act, the pipelines are specifically prohibited from retroactively collecting costs from consumers, regardless whether they are prudently incurred or not. However, the Commission has put the issue in correct prospective, *i.e.*, the NGPA's guaranteed passthrough provision is essentially the same as the Commission's previous guarantee that Pipelines be permitted to pass through their cost of purchased gas to the extent prudently incurred. The two concepts are analogous and both are controlled by the NGA's denial to both the courts and the Commission the power to retroactively increase rates to consumers above those on file with the Commission.

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costs associated therewith.

The Commission similarly ruled in El Paso Natural Gas Company, 42 F.E.R.C. ¶ 61,024 at 61,148 (1988):

> Although the NGPA limits the Commission's ability to deny the passthrough of certain statutorily defined "just and reasonable" purchased gas costs (unless the Commission finds that the amounts were excessive due to fraud, abuse, or similar grounds) a pipeline's recovery of purchased gas costs is not guaranteed by the statute. . .

Initial Brief of Petitioner,
Municipal Defense Group Nos. 85-1846, *et al.*

* * *

The Commission has also alleged that these retroactive charges are required by the "passthrough" provision of the NGPA, Section 601, 15 U.S.C. § 3431. The Commission is wrong here too. Section 601 simply deems NGPA prices to be "just and reasonable" for the purpose of Sections 4 and 5 of the NGA, and restricts the Commission's power to deny pipeline recovery of the NGPA "just and reasonable" amounts paid.

However, as noted *supra* in *Arkansas Louisiana*, the Supreme Court found that neither the Commission nor the courts had *any* power to deny or grant retroactive rate charge pursuant to the NGA, and:

> the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas supply sold.

453 U.S. at 578. While the NGPA restricted some of the Commission's authority under the NGA, there is nothing in the NGPA which expands Commission NGA powers to permit it to violate the filed rate doctrine or the ban against retroactive ratemaking.

The fact that Section 601 of NGPA deems these rates to be "just and reasonable" for the purposes of Sections 4 and 5 of the NGA is irrelevant. The filed rate doctrine and rule against retroactivity bar "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *Arkansas Louisiana, supra*, 453 U.S. at 378, citing *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979); *see also, Electric District, supra*, 774 F.2d at 442.

Even in *Texas Eastern* it was recognized that the NGPA did not modify pre-existing ratemaking principles to guarantee the pipelines the right to recover all NGPA costs from consumers. The court ruled that, consistent with the Commission's past consumer protection principles, the pipelines could only pass-through to consumers the NGPA maximum lawful price, not the cost of transporting the producers' own liquids. If the contract between the pipeline and producer provided that the pipeline would provide that service to the producer, the pipeline, *not* the consumer, would have to bear the costs associated therewith. Id., 764 F.2d at 1068-1069.

CONCLUSION

WHEREFORE, for the foregoing reasons, the MDG respectfully requests that the Court reverse the rulings of the Commission below and require the Commission to order refunds of all retroactive "Order 94" charges which the Commission previously allowed Panhandle Eastern Pipeline Company to charge the MDG.

Transcript of Oral Argument, October 12, 1989, *Columbia Gas Transmission Corporation, et al. v. Federal Energy Regulatory Commission*, Nos. 88-1701, *et al.*

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ORAL ARGUMENT OF JILL HALL, ESQ.,
ON BEHALF OF RESPONDENT

[18] MS. HALL: May it please the Court—

QUESTION: Ms. Hall, how do you get around Mr. Malter's laying out of authority for the proposition that the Commission is without the power to impose retroactive costs?

MS. HALL: Your Honor, when you look at all the past cases that have come down from this, you have got to go first to the statute and the statute says that the Commission, for good cause shown, may allow waiver of the section 4(d) notice requirement.

QUESTION: Waiver of a 30-day period, that means, instead of having this price increase go into effect tomorrow, it goes into effect today. It says nothing about yesterday.

MS. HALL: Well, Your Honor, the cases have interpreted this as allowing for past that period. In *Hall v. FERC*, it was a 20-year period where the producers in *Hall* were allowed to go back and collect these prices. The Commission submits today—

QUESTION: That was to allow two parties to implement their agreement as to when price increases would start. This is—

[19] MS. HALL: Nevertheless, Your Honor—

QUESTION: But is this an imposition by the Commission of a retroactive increase?

MS. HALL: Excuse me, is it an—

QUESTION: An imposition, the Supreme Court says it cannot impose. To acknowledge and sanctify a private agreement is not an imposition, is it?

MS. HALL: Your Honor, in all of these cases, the Commission allowed, when a waiver was submitted, the substitution of another rate for rate previously on file. So, when you look at the genre of these cases coming down, yes, the Commission admits today that there was customer consent in all the other cases. Here there was no way to have customer consent in these cases. You are not going to get these people to agree to costs, retroactive imposition of costs. The Commission recognized and the Commission looked at the statute, the plain language of the statute, and it says the Commission, for good cause shown, may allow changes to take effect, and when the Commission looked at that wording—

QUESTION: They allow a time period to be waived.

MS. HALL: It may allow the time period to be waived, and in—

QUESTION: But does the waiver or the power to waive a 30-day time period necessarily imply the power to act retroactively to impose a rate?

[20] MS. HALL: The Commission submits that it does, Your Honor. The Commission submits that it does, and in the circumstance—

QUESTION: Is that the only source you assert for the power to impose rates retroactively?

MS. HALL: The Commission asserts that the waiver in the section 4(d) requirement allows you to do this, but only for good cause shown.

QUESTION: Is that the only source you assert for the power to impose rates retroactively?

MS. HALL: Well, the Commission would contend, Your Honor, that semantics, aside from all the other cases, you

were imposing a retroactive rate increase. You could hinge it on customer consent and you could say it was prospective when customer consent, because you had something to hang it on.

In all these cases, there were equities that compelled the Commission to waive the notice requirements in those cases, and—

QUESTION: So, any time the Commission finds that there are equities that it interprets to constitute good cause, it may do anything it wants retroactively?

MS. HALL: I think that is hardly the position that the Commission is taking here today. The Commission is—

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